No. [redacted] 903 45

In the Supreme Court of the United States

OCTOBER TERM, 1940

THE UNITED STATES, PETITIONER

v.

THE KANSAS FLOUR MILLS CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

CITATIONS

302873—41

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Claims was entered January 6, 1941, and is, as yet, unreported.

JURISDICTION

The judgment of the Court of Claims was entered January 6, 1941. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

in the amount of $[illegible] were forwarded to the General Accounting Office.

Payment of the vouchers was withheld by the Comptroller General on the ground that respondent had been overpaid in an amount aggregating $[illegible] on eight earlier contracts covering the sale of flour to the United States. This amount represented the Agricultural Adjustment Act processing taxes on the flour covered by the eight contracts. As a result of an injunction obtained by respondent against the collection from it of any processing taxes, and the decision in *United States* v. *Butler*, 297 U. S. 1, no part of the $[illegible] was ever paid to the United States.

Each of the eight contracts contained the following provision:

> Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or

> decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items.

On April 20, 1938, respondent filed this suit in the Court of Claims to recover on the four contracts described above, and contested the offsets claimed by the Government arising out of the eight contracts. The Court of Claims entered judgment in favor of the respondent in the amount of $23,288.11, relying primarily upon its earlier decision in *Ismert-Hincke Milling Co* v. *United States*, 90 C. Cls. 27.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the Comptroller General was not entitled to credit, against amounts due on later contracts, amounts paid respondent on earlier contracts in reimbursement for processing taxes, which the contractor never paid.

2. In failing and refusing to hold that the contracts provided for adjustment of the prices therein to compensate for the changes in the applicable federal taxes resulting from the injunction obtained against collection of the taxes and the decision in *United States* v. *Butler*, 297 U. S. 1.

3. In holding that the amounts included in the contract prices to compensate for processing taxes

were buried in such prices and could not be segregated therefrom.

4. In failing to hold that price adjustments were necessary notwithstanding the absence of any express Congressional repeal of the processing taxes imposed by the Agricultural Adjustment Act.

5. In failing to hold that, if Congressional action were necessary, the comprehensive statutory machinery established by Congress in 1936 for refunds of processing taxes constituted such Congressional action.

6. In failing to enter judgment for the United States and dismissing the petition.

REASONS FOR GRANTING THE WRIT

1. The question presented is of general importance. Nearly all Government contracts for the purchase of supplies since 1933 have contained either identical or substantially similar provisions. There are now pending in the Court of Claims and in various other federal courts approximately 15 cases raising the same question. In addition, approximately 25 cases have been transferred by the General Accounting Office to the Department of Justice in which suit has not yet been instituted and the Comptroller General advises that the cases of approximately 170 additional contractors, involving a much larger number of contracts and totaling approximately $2,000,000 in amount, are still pending in his office.

The Government refrained from petitioning for certiorari in *Ismert-Hincke Milling Co.* v. *United States*, 90 C. Cls. 27, hoping that a conflict might develop shortly thereafter. However, nearly eighteen months have passed since that decision,[1] and it is in the public interest that the question be settled without further delay.

2. The lower court's interpretation of the contractual provisions in question conflicts with the views of this Court as to the purpose of those provisions expressed in *United States* v. *Glenn L. Martin Co.*, 308 U. S. 62, and *United States* v. *Cowden Manufacturing Co.*, No. 188, present Term. Both cases involved contractual provisions substantially identical with those in the instant case. The former raised the question whether after-imposed Social Security taxes might be added to the contract price. This Court, in construing the price clause, recognized that, so far as taxes imposed directly on the articles contracted for were concerned, the contract was designed to stabilize the contractor's margin of profit (p. 64), but held that Social Security taxes were not imposed "on" the articles sold to the United States.

The latter case presented the question whether processing taxes paid by the first processor of the

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[1] Meanwhile the Ninth Circuit has decided *United States* v. *Hagan & Cushing Co.*, November 30, 1940, adversely to the Government's position, thus diminishing the possibility of a conflict in the near future.

raw materials used by the contractor in manufacturing the articles sold to the United States and passed on to the contractor might be added to the contract price. This Court held that the contract provided for reimbursement only of taxes imposed directly on the manufacture of the articles and as to which the contractor was the taxpayer. With respect to the price clause the Court concluded that—

> the fair import of the clause is that the United States must make reimbursement only for such taxes as the contractor has paid pursuant to an obligation imposed upon him by the statute which exacts the tax.

This conclusion was reasserted with respect to the phrase "paid by the contractor", for the Court said:

> Moreover, the clause stipulates for reimbursement of taxes "paid by the contractor". It is reasonable to conclude that this phrase also contemplates payment of taxes to the United States in consequence of an obligation imposed by statute upon respondent.

In the instant case, the United States did reimburse the contractor for taxes which at the date of the contract the latter was legally obligated to pay but which in fact it did not pay. In the light of the construction of the tax clause in the *Martin* and *Cowden* cases, the United States was entitled to recover the amounts paid respondent in antici-

pated reimbursement for taxes which the latter was legally obligated to pay on the date the contract was entered into but which in fact were never paid.

The contention that the provisions in question were to be applicable only where *Congress* effected changes in the tax structure imputes to the parties an intention to require Congress to do a nugatory act. Congress could readily have repealed the taxing provisions after the *Butler* decision, and if it had done so, there could be no question that the Government would be entitled to prevail here. But it would have been a useless gesture for Congress to repeal those provisions. Moreover, if Congressional action were necessary in order to produce the price adjustments contemplated by the contract, then it did take such action here when it enacted the comprehensive statutory provisions in 1936 setting forth the conditions upon which refunds might be had, thus giving Congressional recognition to the termination of the processing tax program. Revenue Act of 1936, Secs. 901–917 (c. 690, 49 Stat. 1648).

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted

FRANCIS BIDDLE,
Solicitor General.

APRIL 1941.

APPENDIX

Budget and Accounting Act, 1921, c. 18, 42 Stat. 20:

> SEC. 305. Section 236 of the Revised Statutes is amended to read as follows:
>
> "SEC. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." [U. S. C., Title 31, Sec. 71.]

Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended:

> PROCESSING TAX
>
> SEC. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that any one or more payments authorized to be made under section 8 are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation; * * *. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate

of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that all payments authorized under section 8 which are in effect are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: * * *.

* * * * *

[U. S. C. Supp. V, Title 7, Sec. 609.]

MISCELLANEOUS

SEC. 10. * * *

* * * * *

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this chapter. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

* * * * *

[U. S. C. Supp. V, Title 7, Sec. 610.]

COMMODITIES

SEC. 11. As used in this title, the term "basic agricultural commodity" means

wheat, rye, flax, barley, cotton, field corn, grain sorghums, hogs, cattle, rice, potatoes, tobacco, sugar beets and sugarcane, peanuts, and milk and its products, and any regional or market classification, type, or grade thereof; * * *

[U. S. C. Supp. V, Title 7, Sec. 611.]

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